

IN THE SUPREME COURT OF FLORIDA

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JOHNNY LEE KEYS, JR., )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

CASE NO. 67,504

PETITIONER'S REPLY BRIEF ON THE MERITS

JAMES B. GIBSON  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

KENNETH WITTS  
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POINT I

THE REASONS GIVEN BY THE TRIAL COURT  
FOR DEPARTURE FROM THE RECOMMENDED  
GUIDELINE SENTENCE WERE IMPROPER.

ARGUMENT

The Respondent argues that, in spite of the fact the trial court gave five clearly numbered reasons for departure, there were actually only "two true reasons". Petitioner would maintain that the lower court intended the five reasons to be separate and distinct. If one accepts the Respondent's arguments, however, the reasons for departure are still improper and do not justify the two hundred year departure in this case.

Respondent seems to classify the departure reasons as 1) victim injury, 2) prior record/failure of past sanctions/threat to society. As to victim injury, Petitioner would merely point out that the sentencing scoresheet did contain forty points for penetration or slight injury. Petitioner is aware of the fact that psychological injury has been upheld as a reason for departure. The reason as written by the trial judge is based on both physical and psychological injury and is thus at least partially invalid under Hendrix v. State, 475 So.2d 1218 (Fla. 1985).

What the Respondent would argue is the second reason for departure (comprised of four out of the five reasons actually given) is not clear and convincing. The basis for this reason is prior criminal convictions, not a reason for departure under

Hendrix, supra. The other aspects of this reason were discussed separately in Petitioner's brief on the merits. Merely condensing five improper reasons for departure does not change the reasons, and does not validate them.

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION  
BY DEPARTING FROM THE RECOMMENDED GUIDE-  
LINE SENTENCE BY TWO HUNDRED YEARS.

ARGUMENT

Respondent argues, that citing Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980), that reasonable men could differ as to whether the length of departure in this case was proper, and thus, no abuse of discretion occurred. It is impossible to imagine any reasonable person not being offended by a sentence eleven times that recommended by the sentencing guidelines and totaling over two hundred years. This is particularly true when the reasons given for departure are considered. In light of Albritton v. State, 476 So.2d 158 (Fla. 1985), this cause must be remanded for resentencing.

CONCLUSION

BASED UPON the arguments made and authorities presented herein, Petitioner respectfully asks this Honorable Court to reverse the decision of the Fifth District Court of Appeal in this cause.

Respectfully submitted,

JAMES B. GIBSON  
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SEVENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014; and mailed to Johnny Lee Keys, Jr., Inmate No. 039841, #WU 51-1002, Union Correctional Institute, Post Office Box 221, Raiford, Florida 32083, on this 6th day of February, 1986.

*Kenneth Witts*

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